

AN IER RESPONSE

Government's new approach to consultation

**Submission to the House of Lords' Secondary
Legislation Scrutiny Committee**

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By

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The Institute of Employment Rights is an independent charity. We exist to inform the debate around trade union rights and labour law by providing information, critical analysis, and policy ideas through our network of academics, researchers and lawyers.

This IER Response, kindly drafted by the expert named, reflects the authors' own work not the collective views of the Institute. The responsibility of the Institute is limited to approving its publications, briefings and responses as worthy of consideration.

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Carolyn Jones
Director, Institute of Employment Rights
23 November 2012

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1. The Institute of Employment Rights was established in 1989 as a think tank supported by the trade union movement. The Institute conducts a wide range of research and educational activities, and in 1994 was granted charitable status. It produces a broad range of papers on employment and human rights and regularly responds to government consultations on those issues where the Institute has an interest.
2. The last code of practice for consultation was published in July 2008 following an enquiry by the select committee. The Minister at the time, John Hutton MP, said in the introduction to the Code: "Put simply, effective consultation allows the Government to make informed decisions on matters of policy, to improve the delivery of public services, and to improve the accountability of public bodies." The Institute supports that view and believes that the changes introduced by the present government in July of this year (without consultation) undermines each of the principles outlined in the statement above.
3. The Coalition at the start of its term of office entered into a Compact with Civil Society in which it stated it would:
 - a. "Give early notice of forthcoming consultations, where possible, allowing enough time for CSOs to involve their service users, beneficiaries, members, volunteers and trustees in preparing responses. Where it is appropriate, and enables meaningful engagement, conduct 12-week formal written consultations, with clear explanations and rationale for shorter time-frames or a more informal approach."¹
4. The new consultation principles, whilst acknowledging this commitment, proceed to contradict it by removing the commitment to a 12 week period of consultation as a default position. The Institute believes that this will impede the ability of civil society to engage with public consultations given their limited resources and capacity. As such, the new approach to consultation effectively leaves some sections of the public without a voice.
5. This has been evidenced in a recent case of a consultation period that was reduced to three weeks. Responses to the Department for Business, Innovation and Skills' consultation on "Implementing Employee Owner Status" required a large amount of research due to the far-reaching implications of creating a new status of worker. Three weeks was insufficient for organisations to gather strong evidence of the repercussions to workers, employers, tribunal procedures and any complications with EU law. In the absence of considered opinion, this consultation failed to meet the government's own principle where it states that "timeframes for consultation should be realistic to allow stakeholders sufficient time to provide a considered response."²
6. The Institute believes that in place of the commitment to 12-week consultations, what will be left is an incredibly arbitrary system that will result in too little time being given to consultations on key policies and will severely limit the opportunities many

¹ The Compact (Cabinet Office 2010) para. 2.4

² Consultation Principles (July 2012) Cabinet Office – Timing of Consultation

organisations have to engage in public policy development and comment on the decisions that will most affect them and the people they represent. Therefore, the Institute believes that the default consultation period should be 12 weeks in order to ensure all interested parties, regardless of their wealth or size, are able to provide evidence. Where for practical reasons this is deemed impossible, clear explanations must be given by the government department promoting the consultation.

7. In order to ensure open and democratic government, the Institute cannot envisage situations where changes to or new policy is being developed which would not require consultation with interested stakeholders. Whilst there should be many opportunities for stakeholders and civil society to engage in the preliminary debate on policy development outside of the formality of a public consultation, once a formal proposal has been formulated this should be subject to formal public consultation. The argument that some policy changes are simply technical amendments can often hide significant impacts on UK legislation.
8. A recent example of this is evidenced by the case of the amendment to (s) 47 of the Health and Safety at Work Act 1974 that was added to the Enterprise and Regulatory Reform Bill without consultation. This amendment is not simply a technicality but in fact overturns employers' 114-year-old strict liability for the health and safety of their employees, causing major changes to people's real-life experience of employment law. The Institute is firmly of the opinion that the government should have consulted the public before making this amendment.
9. A number of professional bodies have already criticised these changes. One highly respected body The Institute of Occupational Safety and Health (IOSH) believes that slashing timescales so severely would be 'foolhardy' and could potentially put lives at risk.
10. In an article for Workplace Law the IOSH was reported as saying: "It's vital that those who may have important intelligence to contribute and those who may be affected by government proposals, are given full opportunity to have their voices heard. Consultation isn't about rushing, it's about listening."³
11. The Institute recognises that technology now offers alternatives means of responding to formal consultations including email and web based formats. The Institute does not oppose the use of such formats as an option for stakeholders but would be strongly against the introduction of this as the default means of response. It believes that such a move would disempower those without access to technology and thus fail to meet the principle of accessibility which was one of the principles previously outlined in the 2008 Code of Practice⁴.
12. Past experience of on-line responses also suggest that less flexibility in the way respondents address the issues is allowed. Questions are often framed in a manner which limits open responses and guides the writer in a pre-conceived direction.
13. One final issue which the Institute would ask the Committee to consider is the timing of consultations. Introducing consultations during major holiday breaks such as just before Christmas or Easter detracts from the available time for organisations to prepare responses. The Institute therefore suggests that where such breaks occur this should be added to the period of the consultation.

³ <http://www.workplacelaw.net/content/43374>

⁴ Code of Practice on Consultation - Department for Business, Enterprise and Regulatory Reform July 2008 – Criterion 4 page 10

14. It is clear to the Institute that there is little to be gained from the changes which this government has introduced without consultation. On 19th November 2012 the Prime Minister in an address to the CBI said timescales would be reduced where possible and the number of consultations would also be reduced:

“When we came to power there had to be a three month consultation on everything and I mean everything, no matter how big or small. So we are saying to ministers: here’s a revolutionary idea - you decide how long a consultation period this actually needs. If you can get it done properly in a fortnight, great. And we are going further, saying: if there is no need for a consultation, then don’t have one.”
15. Notwithstanding this current enquiry by the Scrutiny Committee, the Prime Minister would appear to have determined the outcome – yet a further indication that the impetus for these changes is not to improve accountability and consultation but to stifle it.
16. The last time government reviewed this code, the OECD, commenting on the regulatory policy of the UK government⁵, said that there was a need for effective quality assurance of the Code of Practice on Consultation. Experience suggested that departments left to themselves do not always meet the highest standards.
17. The Institute suggests that if government continues to apply the new principles with limited timeframes for consultation then it, at least, takes on board the comments of the OECD and introduces a quality assurance process which monitors the effectiveness of the code.

⁵ BETTER REGULATION IN EUROPE: UNITED KINGDOM © OECD 2010 Chapter 3 Recommendation 3.1